



STAFF REPORT

Regular Agenda

To: Gallatin Canyon / Big Sky Planning and Zoning Commission

From: Amy Waring, Code Compliance Specialist

Subject: Pat & Carol Collins Appeal of Code Compliance Specialist decision regarding an alleged zoning violation (employee housing) at the Whitewater Inn

Hearing Date: June 14, 2007

Location: Third Floor Community Room, Gallatin County Courthouse
311 W. Main Street, Bozeman, MT

Background

On or around November 27, 2006, the Planning and Compliance Departments began receiving complaints that Boyne (Big Sky Resort) purchased the Comfort Inn in Big Sky, Montana, renamed it Whitewater Inn, and converted the hotel to employee housing. In response to requests for information regarding the use of Whitewater Inn, Big Sky Resort provided information to Gallatin County on November 28 and 30, 2006 and December 5 and 19, 2006. On or around December 5 or 6, 2006, the Planning Director asked the Code Compliance Specialist to investigate use of Whitewater Inn for employee housing due to the large number of complaints received. On December 21, 2006, Pat and Carol Collins filed an official complaint that Whitewater Inn is being used for Boyne employee housing, which is not allowed in the C-I District of the Gallatin Canyon / Big Sky Zoning District.

On December 26, 2006 I made a decision that the Big Sky Resort continues to operate Whitewater Inn as a hotel, and that they are currently complying with the GC/BS Zoning Regulation. They are not currently operating Whitewater Inn as employee housing as defined in the GC/BS Zoning Regulation.

On January 4, 2007, Pat and Carol Collins filed an appeal of my December 26, 2006 decision. The appeal was timely. The appeal was scheduled for the February 8, 2007 Planning and Zoning Commission hearing.

On January 31, 2007, the Collins submitted additional information in support of their appeal. The information presented was new information, which was not considered in my December 26, 2007 decision. In light of the new information, I continued the February 8, 2007 appeal hearing pending further investigation and verification of the new evidence submitted.

March 5, 2007 Decision

On March 5, 2007, I affirmed my December 26, 2006 decision that Big Sky Resort is operating Whitewater Inn in compliance with the GC/BS Zoning Regulation. I stated that the zoning regulation definition of hotel (Section 6.53) does not clearly define “short-term” lodging. There is nothing in the regulation that suggests Whitewater Inn can or cannot be used for seasonal occupancy. There is nothing in the GC/BS Zoning Regulation that controls hotel industry practices (such as room rates, security deposits, use of facilities, etc). Thus, Big Sky Resort is not illegally using Whitewater Inn to provide seasonal housing to Resort employees. Furthermore, Big Sky Resort’s use of Whitewater Inn is a commercial and service enterprise that serves the needs of the traveling public and local residents (including seasonal residents), which is the intent of the C-I District.

While I acknowledge that Big Sky Resort is clearly using the Whitewater Inn to provide seasonal accommodations for its employees, I believe that the GC/BS Zoning Regulation does not specifically address the issues the complainants raise.

March 16, 2007 Appeal

On March 16, 2007, the Collins appealed my March 5, 2007 decision. The appeal was timely. The appellants requested a June 2007 hearing. **The complainants allege that the Whitewater Inn is not operating solely as a hotel; it is also being used to house employees in violation of the Zoning Regulations.**

The June 14, 2007 Planning and Zoning Commission appeal hearing was noticed in the Bozeman Daily Chronicle on May 20 and 27, 2007.

Gallatin Canyon / Big Sky Advisory Committee Recommendation

On June 4, 2007, the Gallatin Canyon / Big Sky Advisory Committee held a public meeting for the purpose of providing a recommendation to affirm, modify, or reverse the March 5, 2007 decision to the Gallatin Canyon / Big Sky Planning and Zoning Commission. In a 3:0 vote, the Advisory Committee recommends affirmation of the March 5, 2007 decision. However, with this affirmation, the Committee recommends that the Planning and Zoning Commission include a condition which requires that Boyne use reasonable efforts to work with the Planning Department and the Committee to develop a zone text amendment that revises relevant definitions (employee housing, hotel, motel, dormitory, boarding/rooming house, hostel) and adds employee housing as a conditional use in the C-I district. The Committee also hopes that Boyne, having participated in the text amendment process, will voluntarily go through the CUP process once the amendments are approved.

Gallatin Canyon / Big Sky Zoning Regulation

1. The Gallatin Canyon / Big Sky (GC/BS) Zoning Regulation was adopted on July 30, 1996, and amended thereafter.
2. The Whitewater Inn is located in the C-I (Commercial & Industrial Mixed Use) District of the GC/BS Zoning District.

3. Pursuant to **Section 19.1**, the **intent of the C-I District** is to provide both “areas for commercial and service enterprises which are intended to serve the needs of the traveling public and local residents, and areas for light industrial uses for the benefit of the greater Big Sky area.”
4. Pursuant to **Section 39.3**, the Gallatin Canyon / Big Sky Advisory Committee shall consider, formulate, and transmit a recommendation on an alleged zoning violation to the Planning and Zoning Commission.
5. Section 6.13 defines **Boarding/Rooming House** as, “A residential structure that provides lodging with or without meals, is available for permanent or seasonal occupancy, and which makes no provisions for cooking in any of the rooms occupied by paying guests.”
6. Section 6.34 defines **Dormitory** as, “A structure which provides rooms for individuals or groups. Dormitories do not include individual kitchen facilities.”
7. Section 6.37 defines **Dwelling Unit** as, “A structure or portion thereof providing permanent cooking, eating, sleeping and living facilities for one family and any resident domestic employees.”
8. Section 6.38 defines **Employee Housing** as, “Residential units *restricted by covenant* for use by persons employed within the GC/BS Planning and Zoning District, and their families. Employee housing includes dormitories, boarding/rooming houses, and dwelling units.
9. Section 6.52 defines **Hostel** as, “A structure providing dormitory-style, short-term lodging.”
10. **Section 6.53** defines **Hotel** as, “A facility offering short-term lodging on a *daily rate* to the general public and providing additional services, such as restaurants, entertainment, meeting rooms and recreational facilities.”

Appeal Issue: The Whitewater Inn is zoned C-I, which permits motels but not hotels (January 31, 2007 Appeal).

Appeal: Appellants allege that the Whitewater Inn is violating the GC/BS Zoning Regulation because a hotel is not a permitted or conditional use in the C-I District. Motels are a permitted use; hotels are not. According to GC/BS Zoning Regulation definitions, motels rooms have doors opening to the outside, whereas hotels rooms have doors opening to an interior lobby. Since the rooms at Whitewater Inn open to an interior lobby, they are operating as a hotel in violation of the GC/BS Zoning Regulation.

Findings: While it is true the current language in the GC/BS Zoning District permits motels, but not hotels, the Gallatin County Planning Department approved a Land Use Permit for the Comfort Inn on March 17, 1997. As a result, the Comfort Inn was legally permitted in 1997, with rooms opening to an indoor lobby. Thus, the owners of the Whitewater Inn (formerly Comfort Inn) have a valid claim that the use of the Whitewater Inn as a hotel is vested despite any technical distinction between hotel and motel.

Appeal Issue: The Whitewater Inn is also being used to illegally house employees (January 31, 2007 & March 16, 2007 Appeals).

Appeal: Appellants allege that it is common sense that allowing employees to rent rooms throughout the winter ski season is more than short-term; it is seasonal occupancy.

Appellants cite M.C.A. Section 50-51-102(5), which defines “hotel” as, “(a) a building or structure kept, used, maintained as, advertised as, or held out to the public to be a hotel, motel, inn, motor court, tourist court, or public lodginghouse; (b) a place where sleeping accommodations are furnished for a fee to transient guests, with or without meals.” Appellants also cite M.C.A. Section 50-51-102(12), which defines “transient guests” as, “a guest for only a brief stay, such as the traveling public.”

Appellants allege: 1) Employees are not transient guests, 2) Employees are not using the hotel for a brief stay, and 3) The hotel becomes the employees home, the place where they reside, and this is not what a hotel is intended to be.

Appellants allege that Whitewater Inn is not providing additional services to its employees. They prohibit employees from taking advantage of the same services offered to its traveling guests, such as housekeeping, breakfast bar, workout room, and pool.

Appellants allege that common sense dictates that use of Whitewater Inn by Big Sky Resort employees is something other than a hotel. Housing employees at the Whitewater Inn violates the GC/BS Zoning Regulation.

Findings:

Because disposition of the issues involved in this appeal hinge on the interpretation of various provisions of the GC/BS Zoning Regulation, the Planning and Zoning Commission must follow the standard rules for statutory construction. When construing zoning regulations, the Planning and Zoning Commission must simply ascertain and declare what is in substance stated therein, and not to insert what has been omitted or to omit what has been inserted. The fundamental rule of construing zoning regulations adopted pursuant to Title 76, Chpt. 2, Part 1, is that the intent of the Gallatin Canyon/Big Sky Planning and Zoning Regulation controls. **Where the intent of the Regulation can be determined from the plain meaning of the words used, the Planning and Zoning Commission may not go further and apply any other means of interpretation.**

The GC/BS Zoning Regulation definition of hotel is, “A facility offering short-term lodging on a daily rate to the general public and providing additional services, such as restaurants, entertainment, meeting rooms and recreational facilities.”

Appellants argue that there is a notable difference between “short-term” and “seasonal” use. However, there is no legal basis in the GC/BS Zoning Regulation that precludes “seasonal” use from being “short-term” use. Both terms suggest that the use is temporary, and not permanent.

Furthermore, employees are charged a daily rate that is payroll deducted once every two weeks. This is no different than a guest paying for multiple days of stay upon checkout. The Whitewater Inn also

continues to provide various amenities to the public, such as meeting rooms and use of the pool. There is no legal basis in the GC/BS Zoning Regulation that stipulates the same amenities must be offered to everyone. It is a common hotel industry practice to assess different rates for various services, such as use of a fitness room, minibar, or laundry service.

Appellants argue that the use of Whitewater Inn is not a “hotel” and employees are not a “transient guest” as defined by M.C.A. Section 50-51-102(5) and 50-51-102(12) respectively. However, based upon the standard rules for statutory construction, the Commission may only consider the plain meaning of the language in the GC/BS Zoning Regulation. They may not go further and apply any other means of interpretation. Therefore, the Commission may only consider the definitions in the GC/BS Zoning Regulation, and may not consider the definitions appellants cite in M.C.A. Section 50.

In essence, appellants argue that if it walks like a duck, and quacks like a duck, then it must be a duck. Employees are staying at Big Sky Resort for an indefinite period of time. Since the people are Big Sky Resort employees, the Whitewater Inn is being used for employee housing. However, there is absolutely nothing in the GC/BS Zoning Regulation definition of hotel that limits the length of stay, precludes employees from renting a room, or regulates what hotel amenities may be offered. Big Sky Resort’s use of the Whitewater Inn does not violate the definition of hotel.

Appeal Issue: The Whitewater Inn is being impermissibly used as a boarding/rooming house, a dormitory, a hostel and/or employee housing (January 31, 2007 & March 16, 2007 Appeals).

(1) Boarding/Rooming House

The GC/BS Zoning Regulation definition of a boarding/rooming house is, “A residential structure that provides lodging with or without meals, is available for permanent or seasonal occupancy, and which makes no provisions for cooking in any of the rooms occupied by paying guests.”

Appeal: Appellants argue that the definition of boarding/rooming house makes it clear that the use is determined not by how the room is paid for, but by how the room is used. The Resort makes it clear that the rooms are being used for seasonal occupancy by Resort employees.

Appellants allege that the fact that Big Sky Resort has an “employee discount room rental agreement” suggests that there is a term or seasonal rental agreement between the Resort and its employees. Appellants allege that the definition of boarding/rooming house does not require a rental agreement. Appellants further allege that the definition of boarding/rooming house requires you to look at whether the structure is *available* for permanent or seasonal occupancy. They maintain that the Whitewater Inn is available to employees from December through April, which is seasonal occupancy.

In essence, the appellants maintain that the daily rate assessed to employees (which is payroll deducted) and further referenced in their rental agreement is meaningless, just because the rooms are available, and could be used for seasonal occupancy. Since the rooms are available for seasonal occupancy, the Whitewater Inn is operating as a boarding/rooming house rather than a hotel, and in violation of the GC/BS Zoning Regulation.

Findings:

Item #1 of the “Employee Discount Room Rental Agreement for Whitewater Inn” states that the rental agreement shall be on a day-to-day basis. An employee may check in and out at any time, which is no different than any other guest. An employee can check out for the weekend, and then check back in on Monday, which supports the use as a hotel paid at a daily rate. Just because some employees may choose to stay at the Whitewater Inn for an indefinite period of time, does not mean that the use is a boarding/rooming house, and not a hotel.

Furthermore, item #6 of the rental agreement states, “Once rooms become available in the Mountain Lodge or Golden Eagle, employees will no longer be eligible for discounted room rates at the Whitewater Inn. At that time, the hotel manager will inform employees that they will need to relocate to the Mountain Lodge or Golden Eagle or they may choose to remain at the Whitewater at the full rental rate.” Item #6 indicates that rooms at the Whitewater Inn may not be always available for seasonal use.

In their February 22, 2007 letter, Big Sky Resort states that under the previous ownership, construction workers stayed in the same facility many weeks to complete a job. This is no different than Big Sky Resort employees renting a room on a daily basis.

The terms “boarding/rooming house” and “hotel” are not mutually exclusive. The definition of hotel does not preclude seasonal use. Big Sky Resort is not impermissibly operating a boarding/rooming house rather than a hotel at the Whitewater Inn.

(2) Dormitory

The GC/BS Zoning Regulation defines dormitory as, “A structure which provides rooms for individuals or groups. Dormitories do not include individual kitchen facilities.”

The GC/BS Zoning Regulation defines employee housing as, “Residential units *restricted by covenant* for use by persons employed within the GC/BS Planning and Zoning District, and their families. Employee housing includes dormitories, boarding/rooming houses, and dwelling units.

Appeal: Appellants allege that nothing in the definition of “dormitory” states whether a dormitory may be used long term or short term. In any event, they allege that since the rooms are available for seasonal occupancy, that the stay may be considered long term.

The appellants allege that the definition of “employee housing” only requires residential units to be restricted by covenant in order to be classified as “employee housing.” The latter part of the definition (second sentence) does not require dormitories or boarding/rooming houses to be restricted by covenant in order to be classified as “employee housing.”

The appellants allege that while the Whitewater Inn may be being used as a “hotel” for some people, it is being used as a “dormitory” for the 150 employees staying in approximately 48 rooms.

Findings:

It is true that there is nothing in the GC/BS Zoning Regulation definition of “dormitory” that suggests long-term or short-term use. The terms hotel/motel and dormitory are not mutually exclusive. A hotel/motel is included within, and is a subset of the definition of dormitory. Both hotels and motels provide rooms for individuals or groups.

The GC/BS Zoning Regulation definition of dormitory may be broadly construed to house employees, students, traveling youth, church groups, etc. The definition is not restricted to employee housing. In order for a dormitory to be classified as employee housing, the Commission must refer specifically to the zoning regulation’s definition of employee housing.

Employee housing is defined as, “Residential units *restricted by covenant* for use by persons employed within the Gallatin Canyon / Big Sky Zoning District, and their families. Employee housing includes dormitories, boarding/rooming houses, and dwelling units.”

Big Sky Resort has not established covenants specifying the use of Whitewater Inn as employee housing, nor are the employees employed within the GC/BS Zoning District. The zoning definition of employee housing is very narrow, and Big Sky Resort’s current use does not fit within the definition.

Based on the rules the Commission must follow in construing the GC/BS Zoning Regulation, the second sentence of the employee housing definition that includes dormitories, boarding/rooming houses, and dwelling units are examples of types of employee housing. The first sentence that requires covenant restrictions applies to the second sentence.

The appellants allege that only “residential units” as described in the first sentence of the employee housing definition must be restricted by covenant to qualify as employee housing. However, the GC/BS Zoning Regulation does not define “residential units.” When the Zoning Regulation does not define a particular term, the rules of statutory construction allow the Commission to consider other definitions.

The Webster’s II New Riverside Dictionary (1996) defines “residential” as, “1) Of or having residence. 2) Containing or appropriate for residences. The dictionary defines “residence” as 1) The place where one lives. 2) The act or a period of living somewhere.”

Thus, the act or period of living somewhere could apply to the numerous “residential units” in the GC/BS Zoning Regulation including accessory apartment, bed and breakfast, boarding/rooming house, caretaker residence, dormitory, dwelling (single and multi-family), dwelling unit, employee housing, hostel, hotel, mobile home, motel, recreational vehicle, and travel trailer. In order for any of these uses to be considered employee housing, the use must be restricted by covenant.

Big Sky Resort is not impermissibly operating a dormitory rather than a hotel at the Whitewater Inn

(3) Hostel

The GC/BS Zoning Regulation defines **Hostel** as, “A structure providing dormitory-style, short-term lodging.”

Appeal: Appellants argue that a “hostel” is not even mentioned under the definition of “employee housing,” so whether there are covenant restrictions or not is irrelevant. Since it is clear that the Whitewater Inn is not operating as a “hotel” as to the employees, it may be that it is impermissibly operating as a “hostel” since 150 persons are being squeezed into approximately 48 rooms.

Findings: Similar to dormitory, a hotel/motel is included within, and is a subset of the definition of hostel. The same arguments for dormitory above apply to a hostel. A hostel may be a hotel/motel, and it could be employee housing. However, in order for a hostel to be employee housing, the use must be restricted by covenant.

(4) Employee Housing

The GC/BS Zoning Regulation defines **employee housing** as, “Residential units restricted by covenant for use by persons employed within the Gallatin Canyon/Big Sky Planning and Zoning District, and their families. Employee housing includes dormitories, boarding/rooming house, and dwelling units.”

Appeal: The complainants allege that Big Sky Resort is providing employee housing at Whitewater Inn, and the use is not a permitted or conditional use in the CI District.

Findings: As discussed above, uses designated as employee housing require the residential structure to be restricted by covenant for that use. Big Sky Resort has not established covenants specifying the use of Whitewater Inn as employee housing. The zoning definition of employee housing is very narrow, and Big Sky Resort’s current use of Whitewater Inn does not fit within the GC/BS Zoning Regulation definition.

Big Sky Resort is operating Whitewater Inn in compliance with the GC/BS Zoning Regulation. While Big Sky Resort is clearly using the Whitewater Inn to provide seasonal accommodations for its employees, the GC/BS Zoning Regulation does not specifically address the issues the appellants raise.

Staff Suggested Action

The GC / BS Planning and Zoning Commission, after hearing and considering all public testimony, affirm, modify, or reverse the March 5, 2007 decision of the Code Compliance Specialist.

Attachments:

Exhibit A: 11/28/06 and 11/30/06 letters from Brian Wheeler
Exhibit B: 12/21/06 Collins complaint
Exhibit C: 12/26/06 Compliance decision
Exhibit D: 01/04/07 Collins Appeal

Exhibit E: 01/31/07 New appeal information submitted by the Collins
Exhibit F: 02/22/07 Big Sky Resort Response
Exhibit G: Whitewater Inn Room Rental Agreement (Exhibit 1 & 2 of Exhibit F)
Exhibit H: 03/05/07 Decision
Exhibit I: 03/16/07 Collins Appeal
Exhibit J: Public comment